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IN THE

Supreme Court of the United States

October Term, 1961.

No. 850

BENJAMIN BERNSTEIN,

Petitioner,

v.

ABRAHAM J. RIBICOFF, Secretary of Health, Education and Welfare,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BENJAMIN BERNSTEIN,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No.

BENJAMIN BERNSTEIN,

Petitioner,

v.

ABRAHAM J. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Benjamin Bernstein, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 13625.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 192 F. Supp. 138 and is printed at p. 1a *infra*. The opinion of the Court of Appeals for the Third Circuit appears at page 23a, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 8, 1962, *infra* p. 32a. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether, in the absence of a clear congressional mandate to that effect, the Social Security Administration may construe the 1954 Amendments, declared to become effective on January 1, 1955, as affecting rights to Social Security benefits acquired under laws extant in 1951.

2. Whether the Social Security Administration may interpret Sec. 203 of the Social Security Law, subjecting earnings of persons under 72 years of age, in an amount exceeding $1,200 and upwards, to deductions from benefits, as affecting beneficiaries whose earnings from the performance of substantial services for the year in question are less than $1,200.

STATUTES INVOLVED.

The statutes involved are parts of Secs. 203 and 211 of the Act (42 U. S. C. Secs. 403 and 411).

STATEMENT OF THE CASE.

Plaintiff was employed in covered employment as a law clerk between the incipiency of the Social Security Law in 1935 and September 15, 1951 when he attained his sixty-fifth birthday. In the meantime he had been admitted to the Pennsylvania Legal Bar in 1950. During this entire period, Plaintiff was an investing partner in a knit-goods business, in which he never performed any services.

At the age of 65, Plaintiff was validly awarded Social Security benefits and three years later, on September 15,

1954, his wife reached 65 and was also allowed benefits. Commencing September 15, 1961, Plaintiff entered upon the private practice of law.

It is an agreed fact that between September 15, 1961 and January 1, 1965, earnings by self-employed lawyers were not applicable in determining earnings from which deductions could be made under the Social Security Act. Likewise with income accruing to Plaintiff from the knit-goods partnership, since he performed no services there.

The 1954 Amendments, with January 1, 1955 as the declared effective date, eliminated lawyers from among those groups whose earnings had been previously exempt from application toward deductions from benefits, thus making earnings in excess of $1,200 by those of them under 72 years of age available toward deductions.

On May 2, 1957, on the asserted basis of the 1954 Amendments, the Social Security Bureau demanded a refund of benefits paid to Plaintiff and his wife during the years 1955 and 1956. Plaintiff contended, through Bureau channels and then in the United States District Court for the Eastern District of Pennsylvania and finally the United States Court of Appeals for the Third Circuit, that the retroactive application of the 1954 Amendments to him, who had been awarded benefits in 1951, would constitute a taking of his property without due process in contravention of that clause in the Fifth Amendment to the Constitution of the United States, prohibiting such taking.

When the case reached the Agency Referee, he overruled the Administrative determination for the year 1955, on the ground that Plaintiff's earnings from his law practice, in which he rendered substantial services, were less than $1,200, even though his investment income from the knit-goods partnership was in excess of that amount.

The Appeals Council reversed the ruling of the Referee for 1955 and held that Plaintiff's mere effort to earn money in his law practice, regardless of the amount actually earned, constituted the performance of the requisite sub-

stantial services, the earnings from which could be added to the otherwise exempt income from the partnership business to provide the necessary $1,200, or over, essential for deductions.

It is Plaintiff's belief that this startling, unprecedented and even absurd construction of Sec. 203(e)(2) of Title II of the Social Security Act, which deprived Plaintiff and his wife of benefits for 1955, also constituted a taking of their property without due process in violation of the Fifth Amendment prohibiting such taking.

It may not be wholly inappropriate, even though unnecessary in this proceeding, for Plaintiff to indicate that your Honorable Court has frequently held that statutes are not to be given retroactive effect, nor held to affix new obligations to that which has been done in the past, unless the legislative purpose to do so plainly appears, and that the interpretive powers of the Social Security Administration are limited to those specifically granted by Congress.

It is noteworthy that in its brief supporting its appeal to your Honorable Court in *Nestor*, the Government strenuously argued and reiterated on pages 14, 53 and 62, that Sec. 202(n), the disqualifying Amendment, on the basis of which that claimant was deprived of his benefits, was enacted into law prior to the date on which he became eligible, and hence he could not qualify because unable to meet the conditions precedent to entitlement existing at that time. The instant Plaintiff did properly qualify and hence that argument of the Government is ineffectual against him.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Issues Involved in the Instant Plaintiff's Case Are of Material Concern to All Present and Future Claimants Under Title II of the Social Security Act and Their Determination by the Supreme Court Would Reduce Future Litigation Involving These Issues.

The decision of your Honorable Court in the case of *Flemming v. Nestor*, 363 U. S. 603 (1960), by a divided court of 5 to 4, which established primarily that an Act of Congress depriving of Social Security benefits a deported communist who had never qualified for such benefits, was made the ruling authority by the Court immediately below to defeat the present Plaintiff's rights.

Flemming v. Nestor was a landmark in that it contained the first expression by the Supreme Court defining the nature and extent of the rights to benefits of beneficiaries under the Social Security Law. On page 611 of that opinion, your Honorable Court said, "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary Governmental action afforded by the Due Process Clause." Also, "we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

In its decision against Plaintiff and for the Government, the U. S. Court of Appeals said (p. 7 "slip" opinion): "It is not possible to reasonably suggest that the Congressional decision abolishing preferential treatment for lawyers in this statute is a 'patently arbitrary classification, utterly lacking in rational justification'."

Plaintiff believes that it is an arbitrary classification utterly lacking in rational justification for the Social Security Administration, in disregard of general rules of

Statutory Construction and specific decisions of your Honorable Court, to read into a Congressional enactment abolishing preferential treatment for lawyers, an intention not expressed in the Act itself, that it should apply prospectively from its effective date, not only to those who thereafter qualify for benefits, but also to those who were awarded benefits under earlier statutes.

Nestor limits even the right of Congress to pass unreasonable and arbitrary legislation. If Congress lacks the power to deprive a man of his right protected by due process, such a prohibition should be even more applicable against administrative action. The reliance by the Court of Appeals on *Nestor* appears to Plaintiff to be totally unwarranted because of the many material distinctions between the two cases. Even in that much weaker case, four Justices comprising the minority sustained the lower Court.

The Court of Appeals also relied on what it called (p. 610) "the opinion's controlling general language characterizing the interest of an employee covered by the Act as 'non-contractual'." In this regard Plaintiff respectfully desires to submit evidence of record, not presented by either party in *Nestor*, which appears to Plaintiff as relevant toward the determination of the right to benefits of a Social Security claimant or beneficiary. Thus, in his message to Congress on January 17, 1935, recommending legislation on the subject of economic security (House Document 81, 74th Congress, 1st Session, President Roosevelt proposed (pp. 21, 28):

> "An adequate old-age program consisting of *non-contributory pensions* and *contributory annuities* . . . Contributory annuities are unquestionably preferable to non-contributory pensions. They come to the workers as a right, whereas the non-contributory pensions must be conditioned upon a *means* test.
>
> . . . Contributions by employees represent a self-respecting method through which workers make their own provision for old age." (Emphasis supplied.)

Again, this revealing colloquy by members of Congress (79 Congressional Record, Part 5, Page 5538) when considering the legislation culminating in the Social Security Law:

> "Mr. May: 'I am wondering if Title II was not designed by the committee for the purpose of gradually eliminating some of the direct old age *pensions* as the *annuity* fund increases.' (Emphasis supplied.)
>
> "Mr. Samuel B. Hill: 'It is true.'
>
> "Mr. May: 'And that in the end it will help to reduce, rather than enlarge the responsibility of the government for old age pensions.'

And it was that very Congress which enacted the Social Security Act of 1935, which was signed by President Roosevelt, and which in its final form provided in Sec. 202(a) of Title II:

> "Every qualified individual . . . shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) . . ."

Is it possible that President Roosevelt and the members of Congress, when they spoke of annuities for beneficiaries under Title II, *supra*, were indulging in mere semantics or perpetrating a cruel hoax on all the low-income clerks, laborers, and mechanics, whose economic futures the Social Security Law was ostensibly intended to protect?

Assuming an extreme case of a young man of 18 years who finds employment, which continues for 47 years until he reaches the age of 65. During that entire period, deductions are made from his wages. In the meantime the claimant has planned his life and that of his family, even to the extent of carrying less protection in other forms of insurance, on the expectancy of benefits when he attains the

qualifying age. Upon the arrival of that time, benefits are properly awarded to him, which shortly thereafter are either diminished or entirely taken away on the basis of some change in the Social Security Law or some capricious interpretation by the Social Security Administration. Even by the remotest stretch of the imagination, it is hard to conceive that those who enacted the Social Security Law contemplated such a situation.

Will it always be necessary for Social Security claimants to carry their cases all the way to the Supreme Court in order to ascertain whether a Congressional Act or Administrative construction is arbitrary? Only if the claimant or beneficiary is financially able to bear the inevitable expense, which frequently exceeds the possible financial benefits to be derived from the appeal, can an attempt to invoke the aid of the Supreme Court be made.

Conclusion.

Plaintiff respectfully submits that some standard, or measuring rod, from your Honorable Court defining the rights to benefits of those within covered employment, and indicating whether or not those benefits, once properly awarded, may be later diminished or taken away entirely, either by Congressional enactment or Administrative interpretation, would uncoubtedly have the salutary effect of at least curtailing, if not entirely eliminating, litigation from this source.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BENJAMIN BERNSTEIN,
Petitioner and Attorney pro se.

APPENDIX TO PETITION.

IN THE

United States District Court

EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 25179.

BENJAMIN BERNSTEIN

v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE.

OPINION AND ORDER SUR CROSS MOTIONS FOR SUMMARY JUDGMENT.

March 14, 1961.

LORD, *J.*

This is an action under section 205(g) of the Social Security Act of August 14, 1935; 49 Stat. 624, 42 U. S. C. A. section 405(g), as amended (hereinafter referred to as the *Act*), which provides for judicial review of the final decision of the Secretary of Health, Education and Welfare (hereinafter referred to as the *Secretary*).

Both parties have filed motions for summary judgment. The parties admit that there is no substantial disagreement as to any matters of fact, and that the case is a proper one for summary judgment here.

History of the Case.

The plaintiff was born on September 15, 1886. On November 24, 1936, while working as a law clerk in the law office of his brother, the plaintiff applied for a Social Se-

curity Account Number. He continued to work for his brother in employment covered by the Act until about September, 1951, when he commenced practicing law as a self-employed attorney. On August 29, 1951, the plaintiff applied for Old-Age Insurance Benefits under the Act, and was awarded $68.50 per month, effective September 19, 1951. On August 26, 1954, the plaintiff's wife applied for a wife's insurance benefits under the provisions of the Act, as amended, and was awarded a monthly benefit in the amount of $44.30 effective September 1954. The plaintiff and his wife received monthly benefits under the Act and its amendments until and including December 1956. The plaintiff had been, for a number of years, a silent partner in Infanta Knitting Mills. He continued as such in 1955 and 1956, but also continued—as he had in the past—to exercise no voice in the conduct of the partnership business and to take no part in its operations. However, he received a share of the net profits and realized at least $37,000 therefrom in 1955. Furthermore, in 1955 plaintiff's net earnings from his law practice amounted to $1,030.50 and in 1956 his net earnings from said practice amounted to $4,604.60. On March 1, 1957, the plaintiff was notified by the Bureau of Old Age and Survivors Insurance that deductions were being imposed against the benefits paid to him and his wife in 1955 and 1956 (except for those paid for the month of August, 1956) in the full amount of the benefits so paid. The reason given was that his earnings during those years had exceeded the amount which under the Act would permit any payment to be made to him or to his wife for those years. Accordingly, the plaintiff and his wife were instructed to refund the respective amounts of benefits erroneously paid to them. The plaintiff protested this notice and requested that the Bureau reconsider its action in imposing the said deductions. The Bureau affirmed its determination and on July 18, 1957, the plaintiff requested a hearing before a Referee.

That hearing was granted, and was held on February 20, 1958—plaintiff appearing with counsel. On March 12,

1958, the Referee rendered his decision in which he found that the plaintiff and his wife were liable for a refund of the payments made to him and his wife during the year 1956 with the exception of the payment made to them in August, 1956, and that no deductions should be imposed against the benefits paid to him and his wife in 1955.

On March 26, 1958, the plaintiff requested of the Appeals Council that it review the Referee's decision insofar as it ordered a refund, and also with regard to the Referee's interpretation of the effect of the "deductions" provision of the 1954 and 1955 amendments to the Act, as applied to the plaintiff's benefits. The Appeals Council had already decided on its own motion to review the decision of the Referee, and the plaintiff and his attorney appeared before the Appeals Council on May 22, 1958, and argued:

> 1. That the Act, correctly interpreted, provides that only the income from a business in which the beneficiary actively participates by performing "substantial services" is includible as earnings for deduction purposes.
>
> 2. That prior to the 1954 amendment, the plaintiff acquired a vested right under the Act to benefits which could not be adversely affected by the subsequent amendments of the Act.
>
> 3. That if the Act, as amended, is held to apply to the plaintiff, it would deprive him of property without due process of law.
>
> 4. That, if deductions are properly impossible so that the payments in question constitute "overpayments," recovery of such overpayments should be waived.

The Appeals Council rendered a decision on June 30, 1958. As to the 1956 payments, it affirmed the Referee's decision which had held that plaintiff and his wife were

liable for a refund of the payments made to him and his wife during that year with the exception of the payment made in August of 1956.

As to the 1955 payments, however, the Appeals Council reversed the Referee, and held that plaintiff's earnings during 1955, when calculated in accordance with the provisions of the Act, were also of an amount sufficient to require "deductions" for that year—with the result that the overpayments for these years should be refunded.

Pursuant to plaintiff's request, the Appeals Council on July 10, 1958, revised or amended its decision, stating as its purpose:

> ". . . to make it clear that the claimant did not concede that the Secretary had the right to impose deductions, regardless of the amount of his net earnings, because he had not waived his right to raise the constitutional question which was decided adversely to him in the Referee's decision." (Tr. 7.)

Thereafter the plaintiff filed his Complaint in this Civil Action. On September 24, 1958, the Chairman of the Appeals Council certified a transcript of the proceedings relating to the claim of Benjamin Bernstein in this case. It is this transcript of the Record to which references will hereafter be made—as in the passage quoted above—as Tr., followed by the page number.

On May 27, 1959, the Government's motion for summary judgment was filed. Subsequently, the plaintiff in turn filed his motion for summary judgment. It is these motions which are presently before this Court.

The questions of law raised by the motions (and, as said before, there are no questions of fact to be decided) will be applied to a somewhat narrower scope than the matters necessarily recounted in this history. Thus, the questions of law at hand do not apply to the eligibility benefits of the wife of Benjamin Bernstein—being briefed and argued solely on the law as applicable to plaintiff, Benjamin Bernstein.

Furthermore, there has been no occasion to devote separate discussion to the matter of plaintiff's 1956 benefits. In that year he earned more than $4,600 from the practice of law and can succeed only if he is able to maintain his position under the first division of the argument which follows. That is, only by prevailing in his constitutional argument (that plaintiff's rights became vested prior to the 1954 amendments, and were in the nature of contractual insurance annuity benefits, and that deprivation thereof is a taking of property without due process of law in violation of the Fifth Amendment) may the decision of the Referee and the Appeals Council as to 1956 be overturned.

The first question is:

> 1. *Were plaintiff's rights to benefits vested before the 1954 Amendments, and are they analogous to rights under a private contract of insurance?*

This question has been stated two ways. The Government takes the affirmative view that:

> The 1954 Amendments to the Social Security Act apply to individuals who were entitled to benefits under the Act prior to January 1, 1955, the effective date of said amendments.

But the plaintiff argues that:

> Amendatory statutes to the Social Security Act of 1935 may not be applied by the Social Security Administration to deprive of benefits those who qualified for them prior to the effective dates of the Amendments.

And develops the point as follows:

> Plaintiff, the claimant, is a self-employed attorney who, in September, 1951, became entitled to, and was awarded, old age benefits under the Social Security Act by reason of his former employment as a wage earner.

Prior to January 1, 1955, a claimant in plaintiff's situation could not be deprived of his old age benefits unless he derived earnings in excess of $1200 from *covered* self-employment in which he performed substantial services. The practice of law was not such covered self-employment.

From 1951 to 1955, plaintiff received income from the active practice of law and also from a knitwear business wherein he was a silent, inactive partner. Old-age benefits were properly paid to him during this period, because his active practice of law was not covered self-employment, and the income derived from the knitwear partnership did not disqualify him from receiving benefits because he performed no personal services whatsoever for that firm.

The Social Security Act Amendments of 1954, effective January 1, 1955, changed the provisions pertaining to the loss by a claimant of old-age benefits by providing that earnings of over $1200 from even *non-covered* employment, for which substantial services were performed, would disqualify a claimant from benefits.

* * *

Since plaintiff's next statement contains a reference to "the $2,080 figure" it is appropriate to quote part of Section 203(b) [42 U. S. C. A. 403(b)] in order to explain subsection (e) from which the $2,080 figure derives.

> Sec. 203(b) Deductions . . . shall be made from any payment . . . to which an individual is entitled . . . for any month—
>
> (1) in which such individual is under the age of 72 and and for which month he is charged with any earnings under the provisions of subsection (e) of this section; . . .

Subsection (e) provides, with respect to the periods here involved, that when an individual's earnings for a

taxable year exceed $1,200, the excess above that figure is "charged" at the rate of $80 per month. The result is that if his earnings for the year exceed $2,080, every month is so "charged" and no benefits are payable.

• • •

The plaintiff's statement and argument continues:

> In 1955, plaintiff's earnings from his active law practice were less than $1200, and his income from the knitwear business was in excess of $2080. . . . In subsequent years, plaintiff's earnings as a lawyer and from the knitwear partnership, were each in excess of $2080.
>
> On May 2, 1957, a demand was made on plaintiff by the Social Security Administration for the refunding of the benefits which had been paid to him and his wife since January 1, 1955. Further benefit payments were suspended until plaintiff's seventy-second birthday in September, 1958, at which time the $2,080 cut-off figure no longer applied to him, and, thenceforth, his benefits were withheld until March, 1960, for an aggregate loss of benefits to plaintiff and his wife in the sum of $5966.80.

On the facts, as thus restated, plaintiff argued at the administrative hearings, and argues here, that:

> . . . the retroactive application of the Social Security Act Amendments of 1954, to him whose right to benefits had matured in 1951 and who had done nothing in the meantime to change his status, would constitute a taking of his property without due process within the meaning of the Fifth Amendment to the Constitution of the United States.
>
> . . .
>
> . . . the 1954 Amendments to the Social Security Act were not intended by Congress to apply to those already

> receiving their old-age benefits under the existing provisions of the Act, but only to individuals who first became entitled to them after the effective date of the Amendments. In none of the Amendments to the Social Security Act of 1935, including those of 1954, did Congress express an intention to have them retroactively applied.

He cites numerous cases to the effect that statutes are not to be given retroactive effect unless the legislative purpose to do so plainly appears; and that rights to benefits which have vested cannot be destroyed by subsequent disqualifying legislation. With a plethora of quotation and reference to legal authority and Congressional proceedings, he argues that the compulsory deductions from earnings under Title VIII are analogous to premium payments on an annuity insurance policy. The rights to Old-Age benefits, he says, were intended by Congress to be of such a character as to preclude their deprivation, once acquired, except as the result of a disqualifying act by the claimant himself.

Many of these arguments may be found in the opinion in a recently decided case, *Nestor v. Folsom*, 169 F. Supp. 922 (D. C. Cir. 1959). Unfortunately for plaintiff's position, however, the vested-rights and insurance-annuity arguments were not followed on the appeal of that case, *Flemming v. Nestor*, 363 U. S. 603 (1960), since the United States Supreme Court said at 610, in reversing the District Court judgment:

> ". . . . It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium benefits.
>
> "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it

> of the flexibility and boldness in adjustment to ever-changing conditions which it demands. . . . It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it '(t)he right to alter, amend, or repeal any provision' of the Act. Section 1104, 49 Stat. 648 . . ."

During the pendency of the appeal in the last-cited case, summary judgment for the government was granted in *Price v. Folsom*, 168 F. Supp. 392 (D. N. J. 1959)—the case of a former salaried employee who opened his private office for law practice in 1954.

The Court of Appeals withheld opinion until the decision in *Flemming v. Nestor*, 363 U. S. 603 (1960), and then affirmed the United States District Court for the District of New Jersey in *Price v. Flemming*, 280 F. 2d 956 (3rd Cir. 1960). Although the petitioner had attempted to distinguish *Nestor*, since it involved a deportation, the Court of Appeals simply repeated, as to the attorney's loss of old age benefits, that the *Nestor* case:

> ". . . expressly rejects the concept of accrued property rights as being a part of the Social Security System. It describes in terms certain the identical benefit with which we are dealing as 'a noncontractual benefit under a social welfare program.'" (280 F. 2d 959)

It accordingly deemed the only question to be whether the 1954 amendment was arbitrary, and concluded:

> ". . . And with the 1954 Amendment including all income without any exception in the deductions for benefits under the Act, it is not possible to reasonably suggest that the Congressional decision abolishing preferential treatment for lawyers in this statute is 'a patently arbitrary classification, utterly lacking in rational justification.'" (ibid.)

The foregoing decisions of the United States Supreme Court and the Court of Appeals for the Third Circuit, it seems, have foreclosed further reconsideration of plaintiff's argument on this score. It is therefore the opinion of this Court that the 1954 Amendments to the Social Security Act apply to this plaintiff. On this point, therefore, the ruling of this Court is against the position taken by plaintiff and in favor of the defendant.

Had the foregoing ruling been otherwise, there would have been no further question in the case. In the present posture, however, there remains one further question.

The second question is:

> 2. *Is income from a business in which an individual has not actively participated by performing "substantial services" includible as "earnings" for the purpose of determining deductions from such individual's benefits under the Social Security Act?*

The Appeals Council has determined this question in the affirmative (Tr. 13). In so doing it reversed the Referee's conclusion that claimant's income as a "partner" was return on an investment and not net earnings from self-employment in the year in question, 1955. Plaintiff contends that decision to have been erroneous, maintaining that

> ". . . if a claimant receives income from a trade or business, for which he performs no substantial services, such income is not to be included for the purpose of charging him with earnings to reduce the benefits to which he is entitled, even though he may be engaged in another business in which he renders substantial services, but the earnings from which are under $1,200."

With great earnestness and skill, the plaintiff argues that the decision of the Appeals Council is arbitrary, capricious, and unprecedented. He sets out the statutes in question, refers to legislative history and, in particular,

Committee Reports: House Report No. 1300, 81st Congress, 1st Session, p. 24 and *Senate Report No. 1669*, 81st Congress, 2d Session, p. 30. Under the policy of the law as stated therein, together with the Administrative regulations, and the examples and illustrations included in the committee reports, he makes the following statement:

> "If the claimant had derived dividend interest or rental income from investments in an amount exceeding even several thousand dollars a year, this would not defeat his right to benefits where his earnings from the practice of law were less than $1200 (Reg. 404.1052). Similarly, since claimant's interest in the knitwear business amounted merely (as the Agency Referee found) (Tr. 41) to an investment of capital, the income from that business likewise should, as stated in the Committee Reports, be treated as an investment which does not defeat his rights to benefits, even though the income may be subject, for other purposes, to self-employment tax."

It may be conceded that if the income had not been from a partnership, the result might have been different. "Partnership income", however, is the language of the statute.

The statute has been recently interpreted in *Price v. Flemming*, 280 F. 2d 956, 959 (3rd Cir., rehearing den. Oct. 12, 1960) in the following language:

> ". . . And with the 1954 Amendment including all income without any exception in the deductions for benefits under the Act, it is not possible to reasonably suggest that the Congressional decision abolishing preferential treatment for lawyers in this statute is 'a patently arbitrary classification, utterly lacking in rational justification.'"

The dictum that the 1954 Amendment includes *all income without any exception in the deductions for benefits* is certainly not to be disregarded by this Court.

Furthermore, the decision of the Appeals Council represents an administrative construction of the Act, and regulations thereunder, which is entitled to great weight, and is not to be overturned unless clearly wrong, or unless a different construction is plainly required. *United States v. Short*, 240 F. 2d 292, 298 (9th Cir. 1956) collecting numerous decisions of the United States Supreme Court:

> ". . . This general rule, of course, 'has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' *Norwegian Nitrogen Products Co. v. United States*, 1933, 288 U. S. 294, 315, 53 S. Ct. 350, 358; *United States v. American Trucking Ass'ns., Inc.*, 1940, 310 U. S. 534, 549, 60 S. Ct. 1059." (p. 298)

Although the present question is one of considerable technicality at best, plaintiff has raised an additional argument on this second point which is of particular subtlety. That contention, not heretofore discussed, refers to the applicability of certain of the Rules and Regulations issued pursuant to the Social Security Act. Speaking of these regulations, as set out in the Appeals Council opinion (Tr. 13, 16) and also submitted separately by the defendant, plaintiff takes the position that certain of the regulations have been misinterpreted by the Appeals Council. Those regulations, Reg. 404.1050-1052, he points out, refer to section 211 of the Social Security Act; and section 211 of the Act concerns itself with the initial computation of the amount of net earnings from self-employment. That is, plaintiff argues that these regulations, incorporating section 211, relate only to the building-up of benefits (and contributions) for Social Security. Therefore, he says, "these regulations in no way pertain to the problem of reduction of benefits."

This Court cannot agree. To the contrary, the Act refers to "income from partnerships" as includible in earnings for the purpose of "deductions"—that is, for disqualification from Old-Age benefits. The text of these statutory sections may be seen in Appendices A and B herewith (hereafter cited as *App.*). Section 203 of the Act (App. A), providing for reduction of insurance benefits, refers in its parts (b) and (b)(1) to part (e) as to deducting annual earnings in excess of $1,200. 42 U. S. C. A. Section 403. In the same section it is provided:

> (4)(A) An individual's earnings for a *taxable* year shall be the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

Paragraph (B) (App. A) then provides that section 211 of the Act (42 U. S. C. A. Section 411) shall be applicable in determining the individual's net earnings from self-employment (with certain exclusions).

As may be seen in Appendix B, which sets out the pertinent parts of section 411 (Section 211 of the Act, hereinafter like other sections to be designated by the section numbers of Title 42 of U. S. C. A.) partnership income is included under "net earnings from self-employment."

It may be quite true, as plaintiff urges, that section 411—particularly as incorporated in the Regulations (App. C herewith)—refers in the first instance to the computation of earnings for the purpose of establishing the earnings base to determine entitlement to benefits. However that may be, *as incorporated in section 403*—and not in some other aspect—section 411 must be taken, by the plain meaning of the words, to define earnings from self-employment for the purpose of reducing benefits.

The same section 411 specifically excludes a number of kinds of income. In part (1) it exempts rentals from real estate; part (2) excludes dividends and interest; and

part (3) exempts certain capital gains or losses. Despite the fact that the same section *includes* income from partnerships, plaintiff argues that his particular partnership relation is such that it is merely return on capital.

In the view of this Court, plaintiff's contention is incorrect. The mention of certain forms of investment income in the list of exclusions, but not of partnership income of *any* sort, by the usual rule of statutory construction is taken to mean that there can be no exception here to the rule that partnership income must be counted as part of total self-employment earnings.

In an attempt to avoid obscuring conclusions by excessive quotation in the body of this opinion, the following parts of the Social Security Administrative Regulations are simply set out in Appendix C: Section 404.415 to 404.417 inclusive; and Section 404.1051(c), (d) and (g). These sections, together with passages from applicable Congressional Committee Reports, were incorporated in the decision of the Appeals Council, Tr. 16-20 incl.

Based on the pertinent sections of the Act, and the last-mentioned administrative regulations, the Appeals Council said (Tr. 14):

> ". . . In considering the deduction provisions of the Act, particularly as related to the instant case, it might be well to point out that, generally, deductions are imposed against an individual's benefits if he has not *retired*. It is not a question of whether an individual has retired from only one of his business activities. Thus, where a beneficiary's annual earnings are in excess of $1,200, the excess shall be charged at the rate of $80 per month to the last and each preceding month of the year and deductions are imposed for any month charged with such excess in which a wage earner renders services for wages of more than $80, and in the case of a self-employed person the primary test is whether he is still engaged in self-employment. Where one is engaged in self-employment all of his earnings constitute net earnings from self-employment

except those specifically excepted by statute, and the earnings from the partnership were not so excepted. In other words, they were clearly not capital gains derived from the sale or exchange or a capital asset as indicated by the claimant."

By the foregoing test, it is clear that plaintiff had not *retired* during any month in 1955 with respect to the practice of law. By that same test, it is clear that plaintiff could have charged any partnership losses against his law practice income during the year in question. Section 403(4)(A)(ii), App. A. The plaintiff's contention that his partnership income may not be included is simply not justified by the terms of the statute as it was amended in 1954, and the administrative regulations as promulgated thereunder and interpreted by the Secretary of Health, Education and Welfare through the medium of the Appeals Council.

As heretofore stated, this administrative construction is entitled to great weight. It was the burden of plaintiff here to show that the administrative decision was clearly wrong, and that a different construction was plainly required. *United States v. Short*, 240 F. 2d 292, 298 (9th Cir. 1956). It is the conclusion of this Court that plaintiff has not maintained that burden.

As to point 2, accordingly, the decision of the Appeals Council "that the claimant's benefits for the year 1955 were properly subject to deductions for all months during that year in the full amount of the benefits so paid" is affirmed.

Plaintiff's point 1, having to do with the applicability of the 1954 amendments to the Act as to this plaintiff, has already been decided adversely to the plaintiff. No further questions remain for consideration.

For the foregoing reasons, it is the ruling of this Court that the Motion for Summary Judgment of the Plaintiff is hereby DENIED, and that the Motion for Summary Judgment of the Defendant is hereby GRANTED.

/s/ JOHN W. LORD, JR., *J.*

Appendix to Opinion.

APPENDIX A (excerpts from Section 203 of the Act, 42 U. S. C. A. Section 403:

(b) Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 402 of this title for any month—

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provisions of subsection (e) of this section.

. . .

(e)(1) If an individual's earnings for a taxable year of twelve months are not more than $1,200, no month in such year shall be charged with any earnings. If an individual's earnings for a taxable year of less than twelve months are not more than the product of $100 times the number of months in such year, no month in such year shall be charged with any earnings.

(2) . . . Notwithstanding the preceding provisions of this paragraph, no part of the excess referred to in such provisions shall be charged to any month . . . (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (4) of this subsection) of more than $80.

. . .

(B) For purposes of clause (D) of paragraph (2) of this subsection—

(i) An individual will be presumed, with respect to any month, to have been engaged in self-employment in

such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing . . . his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

(ii) An individual will be presumed, with respect to any month, to have rendered services for wages (determined as provided in paragraph (4) of this subsection) of more than $80 until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount.
(4)(A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

(B) In determining an individual's net earnings from self-employment and his net loss from self-employment for purposes of subparagraph (A) of this paragraph and subparagraph (B) of paragraph (3) of this subsection, the provisions of section 411 of this title, other than paragraphs (1), (4), and (5) of subsection (c) of this section, shall be applicable; . . .

APPENDIX B (Excerpts from Section 211 of the Act, 42 U. S. C. A. Section 411).

(a) The term "net earnings from self-employment" means the gross income, as computed under chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such chapter which are attrib-

utable to such trade or business, plus his distributive share (whether or not distributed) of the ordinary net income or loss, as computed under section 183 of Title 26, from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary net income or loss—

(1) There shall be excluded rentals from real estate and from personal property leased with the real estate . . .

(2) There shall be excluded dividends on any share of stock, and interest on any bond, debenture, note, or certificate, or other evidence of indebtedness, issued with interest coupons or in registered form by any corporation . . .

(3) There shall be excluded any gain or loss which is considered . . . as gain or loss from the sale or exchange of a capital asset, . . .

Self-employment Income:

(b) The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a non-resident alien individual) during any taxable year beginning after 1950; . . .

APPENDIX C (Excerpts from 20—Code of Federal Regulations, 1949 ed., as supplemented).

The following rules and regulations, quoted in pertinent parts, and authorized by section 205 of the Act, Tit. 42 U. S. C. A. Section 405, were quoted in large part in the opinion below, TR. 16-19 inclusive. Section numbers are those of the Social Security Administrative Regulations.

Section 404.415 . . . A person shall be deemed to have engaged in self-employment in any month if in such month he renders substantial services, as defined in Section 404.416, in operating a trade or business as

owner or partner, even though there may be no earnings from self-employment attributable to his services for such month. For purposes of paragraph (b)(5) of this section, an individual will be presumed with respect to any month to have rendered services for wages, as defined in Section 404.417, of more than $80 until it is shown to the satisfaction of the Administration that such individual did not render services in such month for more than such amount.

Section 404.416 (defining substantial services): For the purposes of section 404.415 an individual is presumed to have rendered substantial services in each month in his taxable year. However, he may submit evidence to establish that in any month in such taxable year he did not render substantial services with respect to any trade or business the net income or loss of which is includible in computing his net earnings from self-employment for any taxable year if such taxable year ends prior to his first taxable year beginning after 1954, or in computing his earnings (but without regard to section 404.417(b)) for any taxable year if such taxable year begins after 1954. In determining whether an individual has rendered such substantial services in a month, the particular facts in each case will be examined. The following factors, among others, will be considered in making the determination:

(a) The amount of time devoted to the trade or business.

(b) The amount of capital invested in the trade or business.

(c) The nature of the services rendered by the beneficiary.

(d) The seasonal nature of the trade or business.

(e) The presence or absence of a paid manager, a partner, or a family member who manages the business.

(f) The type of business establishment that is involved, and

(g) The relationship of the activity performed prior to the period of retirement with that performed subsequent to retirement.

Section 404.417 (defined "earnings"): When the term "earnings" is used in this subpart and not as a part of the phrase "net earnings from self-employment", it shall mean an individual's earnings with respect to a taxable year beginning after 1954 and includes the sum of his wages, as defined in paragraph (b) of this section, for services rendered in such year and his net earnings from self-employment, as defined in paragraph (a) of this section, for such year, minus any net loss from self-employment, as defined in paragraph (a) of this section, for such year.

(a) Net earnings from self-employment and net loss from self-employment. An individual's net earnings from self-employment and his net loss from self-employment for the purpose of this section and section 404.416, shall be determined under the provisions of section 211, but without regard to the provisions in paragraphs (1), (4), and (5) of subsection (c); any excess of income over deductions so resulting from such computation shall be his net earnings from self-employment and any excess of deductions over income so resulting shall be his net loss from self-employment.

. . .

Section 404.1051 (income included in net earnings from self-employment).

(c) Where an individual is engaged in more than one trade or business within the meaning of section 211(c)

of the act and section 404.1057, his net earnings from self-employment consists of the aggregate of the net income and losses (computed subject to the special rules provided in this section) of all such trades or businesses carried on by him. Thus, a loss sustained in one trade or business carried on by an individual will operate to offset the income derived by him from another trade or business.

(d) The net earnings from self-employment of an individual include, in addition to the earnings from a trade or business carried on by him, his distributive share of the ordinary net income or ordinary net loss from any trade or business carried on by each partnership of which he is a member. An individual's distributive share of the ordinary net income or ordinary net loss of a partnership shall be computed under section 183 of the Internal Revenue Code subject to the special rules set forth in section 211(a) of the act and in this section and to the exclusions provided in section 211(c) of the act and in section 404.1057.

(g) The net earnings from self-employment of a partner include his distributive share of the ordinary net income or ordinary net loss of the partnership of which he is a member, irrespective of the nature of his membership. Thus, in determining his net earnings from self-employment, a limited or inactive partner includes his distributive share of the ordinary net income or ordinary net loss of the partnership.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 25179

BENJAMIN BERNSTEIN

v.

ABRAHAM J. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE

JUDGMENT.

Before LORD, *J.*

AND NOW, March 14, 1961, in accordance with the opinion and order granting defendant's motion for summary judgment, it is ORDERED that judgment be and is hereby entered in favor of the Defendant, Abraham J. Ribicoff, Secretary of Health, Education and Welfare, and against the Plaintiff, Benjamin Bernstein, with costs.

By THE COURT:

Attest:

R. J. GREENWOOD,
Deputy Clerk.

NOTICE:

There was entered on the docket on 3/15/61 an opinion and order granting deft.'s motion and denying Plff.'s motion for summary judgment as well as the above judgment.

GILBERT W. LUDWIG, *Clerk.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,625

BENJAMIN BERNSTEIN,
Appellant,

-v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 2, 1961

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 8, 1962)

By MCLAUGHLIN, *Circuit Judge.*

The district court sustained administrative decision requiring refund of Social Security benefits by plaintiff and latter appeals.

Appellant was born on September 15, 1886. He worked as a law clerk in his brother's law office for a number of years. He was admitted to the bar himself in 1950 when he was sixty-four years old. He has practiced law as a

self-employed lawyer in Philadelphia since September 1951. During that period he has been an investing partner in a knitting mill. In 1951 he was awarded Social Security benefits of $68.50 a month effective September 1951. By the 1954 amendments to the Act these were increased to $88.50 monthly, effective September 1, 1954. As of the latter date appellant's wife was awarded benefits in the sum of $44.30 a month. Both benefits were paid during 1955 and 1956. These were recomputed in 1957 to total $162.80 monthly, effective July 1956.

Thereafter the Bureau determined appellant had received income from a trade or business in which he had rendered substantial services in excess of $2,080 during each of the years 1955 and 1956 and that he was not entitled to benefits for any month of either of those taxable years except for August 1956 when he was on vacation. Appellant and his wife were found to have been overpaid the sum of $1,593.60 for 1955 and $1,430.80 for 1956.

The Social Security Administration Referee upheld the deductions for 1956 but denied them for 1955. The basis of the latter finding was that since appellant's 1955 net income from his law practice in which he had rendered substantial service in all months was less than $1,200[1] his benefits were not subject to deduction although he had received income of more than $30,000 that year from his knitting mill interest. The Appeals Council sustained the Referee on his 1956 deductions. Regarding the 1955 benefits, the Council held these properly subject to deductions. Appellant brought that decision to the district court for review under Section 205(g) of the Act (42 U. S. C. A. § 405(g)). Both sides moved for summary judgment. It was conceded that no substantial question of fact existed and that summary judgment procedure should be followed. The questions of law were briefed and argued with reference to appellant alone. The district court in an admirable

1 Actually appellant's net earnings from his law practice in 1955 amounted to $1,030.50. It is noted that his gross earnings that year from said practice totaled $7,843.99.

opinion upheld the deductibility of both taxable years. We think the decision sound.

Though appellant's first two points were passed upon by us in Price v. Flemming, 280 F. 2d 956 (1960), cert. den. 365 U. S. 817 (1961), we deem it helpful to again discuss them in some detail.

Prior to the 1954 amendments, income derived from "the performance of service by an individual in the exercise of his profession as a * * * lawyer * * *" was not applicable in determining earnings under the Act. 42 U. S. C. (1952 ed.) 411, 403(b). In 1954, the Act was amended (42 U. S. C. 403) inter alia to make deductions applicable "* * * from *any* payment or payments under this title to which an individual is entitled * * *" and charging such individual "* * * *with any earnings* under the provisions of subsection (e) of this section * * *" Section 403(b)(1). (Emphasis supplied). And 403(e)(4)(B), outlining the method of determining an individual's net earnings from self-employment, was amended to specifically eliminate the application thereto of Section 211(c)(5) which, as above noted, had made earnings of lawyers self-employed in their profession, not applicable in determining earnings from which deductions should be made under the Act.

Appellant urges that the 1954 amendments were intended to operate prospectively. Disclaiming any attack on the constitutionality of the amendments, he contents himself with the assertion that the administrative retroactive interpretation of them is at fault.

As has been already seen, the 1954 amendments specifically apply the new deduction provisions to all future benefit payments irrespective of the date an individual became entitled to benefits. The new deduction provisions which affect our problem are the result of amending (b)(1) and (c) of Section 203.[2] Concerning subsection (b)(1) the Act states that the 1954 amendment "shall *be* applicable in the case of monthly benefits under Title II of the

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2 192 F. Supp. 138 (1961).

Social Security Act for months in any taxable year (of the individual entitled to such benefits) beginning after December 1954. * * *" 68 Stat. 1077. So, by the definitive language of the Act itself the 1954 deduction amendments apply to all monthly benefits payable after January 1, 1955 regardless of their inception. The legislative history completely supports that view. House Report 1698, 83rd Cong. 2nd Sess. p. 70. House Conf. Report 2679, 83rd Cong. 2nd Sess., U. S. C. Cong. and Admin. News, p. 3780. It follows that the administrative finding to this effect is merely the proper acceptance of and adherence to the statute. House Report 1698, supra, p. 21 makes it very clear that the Congressional action was taken in order to end the unfairness of this portion of the Social Security Act which had enabled full benefits to be drawn by individuals working in non-covered employment and self-employment regardless of the amounts received from those sources. The amendment was remedial. It caused all income of an individual to be considered on the question of benefits. It thereby deliberately not only removed an unwitting source of favoritism from the Act respecting individuals qualifying for benefits after Janua[illegible] 1, 1955 but stopped any further benefits of this type which emanated from earlier qualification.

As we have indicated the identical question of whether the 1954 amendments affected benefits where the individual has established his eligibility prior to January 1955 was presented in Price v. Flemming, supra. Appellant participated in the appeal to this court of that suit as amicus curiae. Construing the amendments noted above, we there held in effect that while the statute could have been more precise it did make deductions applicable from any payments to which the person was entitled; it charged that person with any earnings under Section 403, Subsection (e) and in determining self-employment net earnings, it dropped the self-employed practice of law from the exclusions to the definition of self-employment thus making earnings from that source available for deductions from

benefits. Reexamination of the amendments confirms that view.

Appellant next argues that, what he describes as the administrative interpretation of the 1954 amendments, deprived him of vested property rights, contrary to the Fifth Amendment. He attacks the Price decision as erroneously relying on Flemming v. Nestor, 363 U. S. 603 (1960). He repeats the distinctions between the facts in the latter and Price and quotes several portions of both the majority and dissenting opinions, commenting thereon. He fails utterly to mention the opinion's controlling general language characterizing the interest of an employee covered by the Act as "non contractual" (p. 610) and (pp. 610-611) stating that "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. * * * It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving it '[t]he right to alter, amend, or repeal any provision' of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. That provision makes express what is implicit in the institutional needs of the program. See Analysis of the Social Security System, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., pp. 920-921. It was pursuant to that provision that § 202(n) was enacted."

The Court then specifically held:

> "We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.
>
> II.
>
> "This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance

to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of § 202(n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' Helvering v. Davis, supra, at 644. *Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.*" (Emphasis supplied).

We said in Price pp. 958-959:

"It is the fact that Nestor, as stressed by both appellant and the amicus curiae, was not eligible for benefits under the Act until after the statute covering deportation because of past Communist membership became effective. Nestor, states appellant, therefore had no accrued property right. But the Supreme Court did not decide Nestor on that narrow ground. It expressly rejects the concept of accrued property rights as being a part of the Social Security System. It describes in terms certain the identical benefit with which we are dealing as 'a noncontractual benefit under a social welfare program.' Its clear mandate leaves to us only the determination of whether the inclusion of practice of law income in deductions from Social Security benefits by the 1954 Amendments 'manifests a patently arbitrary classification, utterly lacking in rational justification.' And with the 1954 Amendment

> including all income [the reference here is of course to all income from "net earnings from self-employment"] without any exception in the deductions for benefits under the Act, it is not possible to reasonably suggest that the Congressional decision abolishing preferential treatment for lawyers in this statute is 'a patently arbitrary classification, utterly lacking in rational justification.'"

We are satisfied that our above conclusion was and is sound and that it rightly controls our decision on the "vested rights" contention before us.

Appellant as his final point urges that there should be no deductions from his 1955 benefits because he earned less than $1200 that year as a self-employed lawyer. He argues that his other earnings of $30,000 plus are not available for deductions from his benefits since he did not perform any personal services in the business. This view is contrary to the directive of the statute and to the intendment of the Act.

While the Act is necessarily voluminous and unavoidably complex its disposal of the present problem comes through clearly. By section 203(e)(1) (42 U. S. C. 403(e)(1)), the excess over $1200 yearly earnings is deductible at the rate of $80 a month. Where the yearly earnings exceed $2080, there is an $80 monthly deduction and no benefits are payable. Section 203(e)(2)(D) states that no month can be charged with earnings where the beneficiary "did not engage in self employment." Under 403(e)(3)(B), the beneficiary "*will be presumed with respect to any month to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income of which is includible in computing * * * his net earnings or net loss from self-employment for any taxable year.*" (Emphasis supplied).

Under the above unmistakable language an individual can be held not to have been engaged in self-employment only where he has "rendered no substantial services * * * with respect to any trade or business the net income or loss of which is includible in computing * * * his net earnings or net loss from self-employment * * *." It must follow that in those circumstances alone is the individual freed from being charged with "earnings" in accord with Section 203(e)(1). During each month of 1955 appellant rendered substantial services in his law practice. By Section 203(e)(3)(B)(1) he was presumed therefore to have been engaged in self-employment in all months. Section 203(e)(2) outlines the method of charging earnings in all months as called for by Section 203(e)(1). The yearly "earnings" upon which the deductions were imposed by 203(e)(1) are defined in 203(e)(4)(A) as "net earnings from self-employment" and "self-employment", defined in the applicable Section 411, includes a partnership of which the individual is a member.

There is no adequate refutation of the above statutory sequence. In our judgment it forces inclusion of appellant's 1955 partnership earnings as part of his earnings for that year under Section 203(e)(1) and makes them, with appellant's 1955 earnings from his self-employment practice of law, subject to deduction as outlined in that subsection.

The Secretary suggests that the administrative construction of the Act with which we are here dealing is not to be overturned unless clearly wrong or unless a different construction is required. Federal Housing Administration v. The Darlington, 358 U. S. 84, 90 (1958); United States v. American Trucking Associations, Inc., 310 U. S. 534, 549 (1940); Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315 (1933). We agree and reiterate our affirmative approval of his interpretation of the Act with respect to the applicability for deductions of appellant's partnership earnings.

The Secretary also stresses the consistency of the administrative construction of the statute in this connection

with the legislative intent. It seems to us that this cannot be successfully controverted. Appellant protests strenuously that Congress did not demand "cessation of labor or retirement" as a prerequisite to eligibility for benefits. That is true but it is also true that the prime purpose of the Act was "* * * to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." Social Security Board v. Nierotko, 327 U. S. 358, 364 (1946). As long ago as 1936 Mr. Justice Cardozo said in Helvering v. Davis, 301 U. S. 619, 641, "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." Within the limits of the Act's restrictions its benefits may be supplemented. Further, the Act does withdraw from consideration as "net earnings from self-employment" the sort of income arising from passive property ownership. It excludes by name real estate rentals, dividends, interest and certain capital gains and losses. 42 U. S. C. 411a.

The simple fact is that appellant's considerable earnings from his business partnership as reasonably spelled out from the Act itself and from its certain purposes must be considered in fixing appellant's liability for deductions. Appellant insists this is inequitable. We doubt that but in any event such complaint should be made to the Congress.

The judgment of the district court will be affirmed.

BIGGS, *Chief Judge*, concurring.

I concur in everything in the majority opinion except as to the basis stated for the disposition of Bernstein's contention that there should be no deduction for his 1955 benefits because he earned less than $1,200 that year as a self-employed lawyer. On this point I adhere to the reasoning of the Appeals Council.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,625.

BENJAMIN BERNSTEIN,
Appellant,

v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

January 8, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 850

BENJAMIN BERNSTEIN, PETITIONER

v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 1a-21a) is reported at 192 F. Supp. 138. The opinion of the Court of Appeals (Pet. App. 23a-31a) is reported at 299 F. 2d 248.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1962. The petition for a writ of certiorari was filed on April 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1954 amendment to Section 203 of the Social Security Act, 42 U.S.C. 403, making earnings from the self-employed practice of law a basis for deductions from future benefits, is applicable to persons who became eligible for benefits prior to its enactment.

2. Whether, if the 1954 amendment does apply to such persons, it violates the Fifth Amendment in that it deprives those persons of vested property rights without due process of law.

3. Whether income from a business with regard to which the beneficiary has not performed "substantial services" is includible as part of his "earnings" for the purpose of determining deductions from benefits under Section 203 of the Social Security Act.

STATUTES INVOLVED

The pertinent provisions of Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (1952 ed., Supp. V) 401, *et seq.*, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

Petitioner was employed as a law clerk until September of 1951 (Pet. App. 1a–2a). At that time, at the age of 65, he began to receive monthly payments of $68.50 as Old Age Insurance Benefits pursuant to the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401, *et seq.* (Pet. App. 1a–2a).[1] In September of 1951 petitioner began to practice law as a

[1] By virtue of the 1954 amendments to the Act, petitioner's monthly benefits were increased to $88.50 (Pet. App. 24a).

self-employed attorney; and he carried on this practice through 1955 and 1956 (Pet. App. 2a). During these years, he also was a silent partner in a partnership doing business as the Infanta Knitting Mills (*Ibid.*). He exercised no voice in the conduct of the partnership and took no part in its operations, but received a share of its net profits (*Ibid.*). In 1955 petitioner's net earnings from his law practice were $1,030.50, and, in addition, he received some $37,000 from his share in the knitting mill (*Ibid.*). In 1956 he earned $4,604.60 from his law practice, plus income from the knitting mill (*Ibid.*).

On March 1, 1957, petitioner was notified by the Bureau of Old Age and Survivors Insurance that deductions were being imposed against the benefits paid to him in 1955 and 1956 (except for those paid for the month of August 1956) in the full amount of the benefits paid. The reason given was that his earnings during those years had exceeded the permissible amounts under the Act (Pet. App. 2a). Petitioner was instructed to refund the benefits which he had received in those years. Dissatisfied with the determination of the Bureau, petitioner sought and received a hearing before a Referee of the Social Security Administration. The Referee concluded that petitioner was obligated to refund the benefits received in 1956, but that no deductions should have been imposed for the year 1955 (Pet. App. 3a).

Petitioner subsequently requested review by the Appeals Council of the Social Security Administration, which had already decided, on its own motion, to re-examine the decision of the Referee (Pet. App.

3a). Petitioner argued before the Appeals Council that the 1954 amendment to the Act, making earnings from the self-employed practice of law (where substantial services have been performed) a basis for deductions from benefits, was not intended by Congress to apply to persons like petitioner, who had received an award of benefits prior to 1954. Petitioner urged that if the 1954 amendment did apply to such persons, the amendment violated the Due Process Clause of the Fifth Amendment in that it deprived these individuals of vested property rights (Pet. App. 3a).

Petitioner also contended that, in any event, the imposition of deductions in 1955 had not been authorized because, as he read the statute, only such earnings as were derived from a trade or business in which the beneficiary performed substantial services were to be considered in calculating deductions (Pet. App. 3a). Under this interpretation the Administration could consider only the $1,030.50 that petitioner earned in his law practice in 1955, and not the $37,000 net income which he received as partnership income. The Appeals Council reversed the Referee as to the year 1955, concluding that the provisions of the Act required the imposition of deductions in that year as well as in 1956 (Pet. App. 3a–4a). In all other respects, the Referee's decision was affirmed.

Petitioner thereafter brought this suit for judicial review of the Secretary's decision, raising the same contentions that he argued in the administrative proceedings. The district court, in a lengthy opinion,

entered summary judgment in favor of the Secretary (Pet. App. 22a). The court of appeals affirmed. The court of appeals pointed out that it had recently held, in *Price* v. *Flemming*, 280 F. 2d 956, certiorari denied, 365 U.S. 817, that the 1954 amendment to the Social Security Act does apply to persons who received their award of benefits before its effective date, and that, in doing so, the statute is not unconstitutional since the Social Security System does not embody concepts of "accrued property rights." The court also noted in this latter respect that the *Price* decision was itself based on a very recent decision of this Court in *Flemming* v. *Nestor*, 363 U.S. 603. Finally, the court ruled that the administrative agency had properly construed the statute in concluding that petitioner's partnership earnings, as well as his earnings from the practice of law, were to be taken into account in determining whether his benefits were subject to deductions in 1955.

ARGUMENT

This petition raises issues of statutory construction which have been resolved against petitioner by the administrative authorities and the two courts below. The rulings on these issues are plainly correct and do not require further review by this Court. See *Price* v. *Flemming*, 280 F. 2d 956 (C.A. 3), certiorari denied, 365 U.S. 817. Petitioner's apparent constitutional argument—that rights acquired under the Social Security Act are contractual in nature and may not be altered by Congress—was recently considered and rejected by this court in *Flemming* v. *Nestor*, 363 U.S. 603.

1. At the time petitioner began to receive Old Age Insurance Benefits, and until January 1, 1955, a self-employed attorney's earnings from his practice were neither "covered" under the Social Security Act for benefit purposes, nor deductible from benefits otherwise payable under the Act. 42 U.S.C. (1952 ed.) 411, 403(b). In 1954, Section 203 of the Act was amended so as to make earnings from the self-employed practice of law deductible from any benefits payable. 42 U.S.C. (1952 ed., Supp. V, 1958 ed.) 403 (b), (c), 411 (a), (c).

Petitioner's suggestion that, as a matter of statutory construction, the 1954 amendment to Section 203 of the Social Security Act is inapplicable to persons whose entitlement to benefits accrued before the effective date of the amendment[2] is untenable. The statute itself leaves no doubt that Congress intended the new deduction provisions to be applicable with respect to all future benefit payments, regardless of when their recipient first became entitled to benefits. The new provisions, to the extent here relevant resulted from the amending of subsection (b)(1) and (c) of Section 203 of the Act. With respect to subsection (b)(1),[3] the Act specifically provides that the 1954 amendment "shall be applicable in the case of monthly benefits under title II of the Social Security Act for months in any taxable year (of the individual entitled to such benefits) beginning after December

[2] This same argument also was made in the petition for certiorari in *Price* v. *Flemming*, 1960 Term, No. 630, at pp. 4–8. See also p. 12, fn. 6, of the brief in opposition in that case. Certiorari was denied in *Price*, 365 U.S. 817.

[3] These provisions are reprinted in the Appendix, *infra*, pp. 11–13.

1954." 68 Stat. 1077. Since no specific provision is made as to the effective date of the amendment to subsection (e), it is encompassed by the stipulation in the Act that the "remaining amendments [to Section 203] * * * shall be applicable, insofar as they are related to the monthly benefits of an individual which are based on his wages and self-employment income, in the case of monthly benefits under such title II for months in any taxable year (of such individual) beginning after December 1954 * * *." 68 Stat. 1077. The Act thus plainly makes *all* monthly benefits payable after January 1, 1955, subject to the amended deduction provision, and leaves no room for the limited application urged by petitioner.[5]

The amendment in question marked a change of congressional policy. In promulgating it, Congress was seeking to eliminate the "anomaly" in the existing law whereby individuals who worked in "non-covered" employment and self-employment were, regardless of their earnings, permitted to draw full insurance benefits. See H. Rep. No. 1698, *supra*, at p. 21. The new provisions achieved the equitable result of making all income received by an individual relevant in determining his entitlement to insurance

[5] This congressional intent, as expressed in the Act, is mirrored by the legislative history of the 1954 enactment. Thus, House Report No. 1698, 83d Cong., 2d Sess., p. 70, points out that "the amendments made with respect to deductions from an individual's benefits because of his own earnings shall be applicable in the case of monthly benefits for months in any taxable year (of the entitled individual) beginning after December 1954." See also S. Rep. No. 1987, 83d Cong., 2d Sess., 1954, U.S. Code Cong. and Admin. News, p. 3780.

benefits. In view of the remedial objectives of the amendment, it is obvious that Congress had every reason to make subject to its provisions persons, like petitioner, who, while they had already qualified for benefits, would be claiming them on a monthly basis in 1955 and future years.

2. Petitioner apparently also contends that the application of the 1954 amendments to persons who were awarded benefits prior to their enactment violates the Due Process Clause of the Fifth Amendment in that it deprives such individuals of their already existing "right" to benefits. The court of appeals was clearly correct in rejecting this argument in reliance upon its prior decision in *Price* v. *Flemming*, 280 F. 2d 956 (C.A. 3), certiorari denied, 365 U.S. 817, which was, in turn, based upon this Court's holding in *Flemming* v. *Nestor*, 363 U.S. 603.

3. Finally, the Social Security Administration correctly determined, as the courts below held, that petitioner's 1955 benefits were subject to deductions under the 1954 amendments. In 1955, petitioner rendered substantial services in each month in the self-employed practice of law, but his earnings therefrom were less than $1,200 (Pet. App. 2a). In the same year he also received earnings considerably in excess of $2,080 from his partnership share in the knitwear mill, for which he performed no services. (*Ibid.*)

Under the 1954 amendment, deductions from benefits because of earnings are to be made (up to the total amount of the benefits) with respect to any month in which the beneficiary is "charged" with earnings. 42 U.S.C. 403(b)(1) (App., *infra*, p. 11).

Where the beneficiary's annual earnings exceed $1,200, the excess above that figure is "charged" at the rate of $80 per month, first to the last month of the taxable year and then to each preceding month. 42 U.S.C. 403 (e)(2), (App., *infra*, pp. 11–12). Accordingly, if annual earnings exceed $2,080, it is possible for every month to be so "charged," with the result that the year's benefits are extinguished.

"An individual's earnings for a taxable year" are defined to include "his net earnings from self-employment for such year." 42 U.S.C. 403(e)(4)(A) (App., *infra*, p. 13). These in turn are defined so as to include earnings from the self-employed practice of law. 42 U.S.C. 403(e)(4)(B), 411(a), (e) (App., *infra*, pp. 13–14) and from a share in a partnership, with certain exceptions not applicable here (*ibid.*).

Finally, petitioner does not come within the exception of 42 U.S.C. 403(e)(2)(D) (App., *infra*, p. 12) which specifies that no deduction shall be made in any month "in which such individual did not engage in self-employment * * *." An individual is "presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month *with respect to any trade or business* the net income or loss of which is includible in computing * * * his net earnings or net loss from self-employment for any taxable year. * * *" 42 U.S.C. 403(e)(3)(B) (App., *infra*, pp. 12–13). (Emphasis added.) Thus, where the beneficiary did render substantial services during a month in *any* trade or business (as petitioner did in the prac-

tice of law), the net income of which was includible in determining his net earnings from self-employment (as was true of petitioner's earnings from the practice of law), the exceptive provisions formed by subsections (e)(2)(D) and (e)(3)(B)(i) are made inoperative, and Section 203(e)(1) applies with full force with regard to all "earnings" attributable to the month.[5]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[5] Even if the Act was ambiguous in its import, the decision of the Administration, as the district court noted, represents an "administrative construction of the Act, and regulations thereunder, which is entitled to great weight, and is not to be overturned unless clearly wrong, or unless a different construction is plainly required." (Pet. App. 12a; see also, Pet. App. 30a). See *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Association*, 310 U.S. 534, 549.

APPENDIX

Section 203 of the Social Security Act, 42 U.S.C. (1952 ed., Supp. V) 403, provides, in pertinent part:

* * * * *

(b) *Deductions on account of work or failure to have child in care.*

Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 402 of this title for any month—

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provisions of subsection (e) of this section; * * *.

* * * * *

(e) *Months to which earnings are charged.*

For the purposes of subsections (b) and (c) of this section—

(1) If an individual's earnings for a taxable year of twelve months are not more than $1,200, no month in such year shall be charged with any earnings. If an individual's earnings for a taxable year of less than twelve months are not more than the product of $100 times the number of months in such year, no month in such year shall be charged with any earnings.

(2) If an individual's earnings for a taxable year of twelve months are in excess of $1,200, the amount of his earnings in excess of $1,200 shall be charged to months as follows: The first $80 of such excess shall be charged to the last month of such taxable year, and the

balance, if any, of such excess shall be charged at the rate of $80 per month to each preceding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. If an individual's earnings for a taxable year of less than twelve months are more than the product of $100 times the number of months in such year, the amount of such earnings in excess of such product shall be charged to months as follows: The first $80 of such excess shall be charged to the first month of such taxable year, and the balance, if any, shall be charged at the rate of $80 per month to each preceding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. Notwithstanding the preceding provisions of this paragraph, no part of the excess referred to in such provisions shall be charged to any month (A) for which the individual whose earnings are involved was not entitled to a benefit under this title, (B) in which an event described in paragraphs (2), (3), (4), or (5) of subsection (b) of this section occurred, (C) in which such individual was age seventy-two or over, or (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (4) of this subsection) of more than $80.

(3)(A) * * *.

(B) For purposes of clause (D) of paragraph (2) of this subsection—

(i) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in para-

graph (4) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

(ii) An individual will be presumed, with respect to any month, to have rendered services for wages (determined as provided in paragraph (4) of this subsection) of more than $80 until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount.

(4)(A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

(B) In determining an individual's net earnings from self-employment and his net loss from self-employment for purposes of subparagraph (A) of this paragraph and subparagraph (B) of paragraph (3) of this subsection, the provisions of section 411 of this title, other than paragraphs (1), (4), and (5) of subsection (c) of this section, shall be applicable; * * *.

* * * * * *

Section 211 of the Social Security Act, 42 U.S.C. 411, provides, in pertinent part:

§ 411. *Definitions relating to self-employment:* For the purposes of this subchapter—(a) *Net earnings from self-employment.*

The term "net earnings from self-employment" means the gross income, as computed under chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions

allowed under such chapter which are attributable to such trade or business, plus his distributive share (whether or not distributed) of the ordinary net income or loss, as computed under section 183 of Title 26, from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary net income or loss—

(1) There shall be excluded rentals from real estate and from personal property leased with the real estate * * *;

(2) There shall be excluded dividends on any share of stock, and interest on any bond, debenture, note, or certificate, or other evidence of indebtedness, issued with interest coupons or in registered form by any corporation * * *;

(3) There shall be excluded any gain or loss * * * which is considered * * * as gain or loss from the sale or exchange of a capital asset, * * *;

* * * * *

(b) *Self-employment income.*

The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a nonresident alien individual) during any taxable year beginning after 1950; * * *.

* * * * *

(c) *Trade or business.*

The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 23 of Title 26 * * *.

* * * * *